



the Judge awarded claimant a 78.5 percent work disability (a permanent partial general disability that is greater than the permanent functional impairment rating).

Respondent and its insurance carrier contend Judge Barnes erred. At oral argument before the Board, respondent and its insurance carrier argued claimant failed to prove her alleged wage and task losses were related to her alleged November 3, 2001 injury. Consequently, respondent and its insurance carrier request the Board to deny claimant's request for benefits.

Conversely, claimant asks the Board to affirm the Judge's finding that claimant sustained a 78.5 percent work disability. Claimant, however, does request the Board to modify the Award to reflect the corrected pre-injury average weekly wage.

Although the parties briefed other issues, at oral argument before the Board the parties agreed that the only issue that remained in this proceeding was whether claimant's wage and task losses were caused by the alleged November 3, 2001 injury. Accordingly, that is the sole issue before the Board on this appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant was employed by respondent as a housekeeper. On November 3, 2001, claimant was struck in the back by a door while emptying a trash container. Claimant described the accident, as follows:

The trash that I took out from the kitchen, it was very big. It reached almost to my chest area, the can. I would take it to the room where the deposit was. The door was not working correctly. And the deposit for the trash was very, very close because the room was very small. With one foot I had to hold the door open so that it would not close on me, and with the other foot I would have to move the trash can forward so that I could put it in the deposit. But it was difficult because the can barely fit between my body and the deposit by the time the door would come in. The floor was very dirty, and it was very difficult to maintain one foot forward and one foot in back. The door came loose and it hit me on the back and pressed me into the can, in between the door and the can. I notified my supervisors immediately.<sup>1</sup>

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<sup>1</sup> R.H. Trans. at 9-10.

Claimant immediately reported the incident to her supervisor. The next day claimant saw a Dr. Littell and began conservative medical treatment consisting of physical therapy and medications. Claimant continued to work for respondent until May 12, 2002, when respondent advised her it could no longer accommodate her work restrictions.

In June 2002, respondent and its insurance carrier began providing claimant with vocational rehabilitation services. When claimant's vocational rehabilitation counselor, Dan R. Zumalt, determined claimant needed to improve her English skills to a sixth grade level to improve her chances of employment, claimant began an education plan including English lessons, tutoring, studying for her GED and practical application of the English language.

When claimant testified at her March 2003 regular hearing, claimant was unemployed and had not worked since leaving respondent's employment. At that time, claimant was participating in the education plan and had been taking English lessons for about a month and a half.

As of April 2003, Mr. Zumalt anticipated the education plan would be completed by late June 2003. Moreover, Mr. Zumalt anticipated claimant, after completing her education plan, would be able to obtain a job in telecommunications such as taking orders for catalog sales, conducting telephone verifications, conducting telephone surveys, doing outbound telemarketing, or dispatching. Mr. Zumalt believed those jobs had starting wages at around \$6 to \$6.50 per hour.

Claimant presented testimony from Dr. Pedro A. Murati. At her attorney's request, claimant saw Dr. Murati in July 2002 to be evaluated for purposes of this claim. Claimant told Dr. Murati about being struck in the back by the door to respondent's trash room on November 3, 2001, and experiencing immediate low back pain. In his July 2002 report, Dr. Murati noted claimant's history of injury, as follows:

This 57-year-old, right-hand dominant, Hispanic female sees me today at the request of her attorney. The patient states she is employed with Via Christi St. Francis Medical Center in housekeeping and has been there for approximately five years. On 11-03-01, patient was going through a door in the trash room and was pulling on a trash container when the door came back hitting her in the low back. The patient reports the trash was very heavy and she experienced immediate low back pain. The patient states that she continued to work and then had to go home due to increased low back pain. Patient states the next day she saw Dr. Littell *[sic]* for severe low back pain[.] He ordered physical therapy and medications. . . .<sup>2</sup>

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<sup>2</sup> Murati Depo., Ex. 1 at 1.

Dr. Murati diagnosed lumbosacral strain with radiculopathy, which he rated as comprising a 10 percent whole body functional impairment as measured by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) and which he related to the November 2001 incident at work.

Dr. Murati also recommended the following work restrictions and limitations:

No crawling; rarely bend at the waist; occasional sit, stairs, ladders, squatting and driving; frequently stand and walk; occasional lift to 20 pounds and no more, frequently 10 pounds; alternate sit, stand and walk; use good body mechanics at all times.<sup>3</sup>

At his deposition, Dr. Murati reviewed a list of the work tasks claimant performed in the 15-year period before the November 2001 accident. The doctor indicated claimant had lost the ability to perform eight of the 14 former tasks (or 57 percent) due to her low back injury.

Rehabilitation consultant Karen Crist Terrill also testified in this claim. Ms. Terrill interviewed claimant and compiled the list of former work tasks that Dr. Murati reviewed. Ms. Terrill also believes claimant has the ability to earn \$6 to \$6.50 per hour in the open labor market.

The Judge found claimant injured her back on November 3, 2001, while working for respondent. The Board finds no reason to disturb that finding. The evidence establishes it is more probably true than not that claimant injured her back while emptying a large trash container during which she was struck in the back by a door. Claimant's accident arose out of and in the course of her employment with respondent and, therefore, claimant is entitled to receive workers compensation benefits for that accident.

At this juncture of the claim, respondent and its insurance carrier do not challenge claimant's efforts in her education plan or her efforts to find appropriate employment. Nor do respondent and its insurance carrier challenge the Judge's analysis of permanent partial general disability as defined by K.S.A. 44-510e. Moreover, the Board finds no reason to disturb the Judge's findings and conclusions regarding the nature and extent of claimant's injury and disability. Accordingly, the Board adopts those findings and conclusions as its own. Consequently, claimant is entitled to receive compensation for a 78.5 percent work disability.

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<sup>3</sup> Murati Depo. at 8.

**AWARD**

**WHEREFORE**, the Board modifies the August 5, 2003 Award to correct the pre-injury average weekly wage to \$446.33.

Rafaela de la Torre is granted compensation from Via Christi Regional Medical Center and its insurance carrier for a November 3, 2001 accident and resulting disability. Based upon an average weekly wage of \$446.33, Ms. de la Torre is entitled to receive 325.78 weeks of permanent partial general disability benefits at \$297.57 per week, or \$96,942.35, for a 78.5 percent permanent partial general disability and a total award of \$96,942.35.

As of February 20, 2004, Ms. de la Torre is entitled to receive 119.86 weeks of permanent partial general disability compensation at \$297.57 per week in the sum of \$35,666.74, for a total due and owing of \$35,666.74, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$61,275.61 shall be paid at \$297.57 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director